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Nos. 07-984 and 07-990

In The
Supreme Court of the United States

COEUR ALASKA, INC.,

Petitioner,

v.

SOUTHEAST ALASKA CONSERVATION COUNCIL, et al.,

Respondents.

STATE OF ALASKA,

Petitioner,

v.

SOUTHEAST ALASKA CONSERVATION COUNCIL, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

AMICUS CURIAE BRIEF OF AMERICAN RIVERS, NATIONAL WILDLIFE FEDERATION, NATURAL RESOURCES DEFENSE COUNCIL, EARTHWORKS, AND WATERKEEPER ALLIANCE IN SUPPORT OF RESPONDENTS

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INTERESTS OF *AMICI CURIAE*

Amici American Rivers, National Wildlife Federation, Natural Resources Defense Council, Earthworks, and Waterkeeper Alliance submit this brief in support of Respondents Southeast Alaska Conservation Council, et al., urging the Court to affirm the decision below.[1] *Amici* are non-profit public interest organizations working to protect the environment, public health, and communities that rely on healthy waters, whose work includes persuading policy makers to provide greater environmental and public health protection, conducting research into environmental and public health problems, and using the citizen suit provisions of environmental laws, including the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, to enforce those laws. *Amici* all have a long history of involvement in, and expertise concerning, the protection of our nation's waters and the implementation of the Clean Water Act. Through testimony in Congress, comments and other advocacy in the Executive Branch, and litigation in the courts, they have pursued these interests repeatedly during the three

[1] In accordance with S. Ct. Rule 37.3(a), all parties have consented to the filing of this brief. All petitioners and respondents except the United States have done so by consent letters filed directly with the Clerk; the consent of the Solicitor General is filed herewith. Pursuant to S. Ct. Rule 37.6, Counsel for *Amici* state that no counsel for a party authored this brief in whole or in part and no person or entity other than *Amici* or their counsel made a monetary contribution to the preparation or submission of this brief.

decades since enactment of the seminal 1972 amendments that gave the Act its current structure. Specifically, *Amici* have participated in the section 402 and section 404 permitting processes under the Clean Water Act and have been involved as parties or friends of the court in various Clean Water Act cases before this Court and others, including through the filing of an *amicus* brief in the lower court in this case. All of these organizations have members and supporters who use and rely on a wide array of waters throughout our nation for recreation, scientific study, and protection of their health, safety, property, drinking water, and food supply. *Amici*'s interests in protecting waterways across the United States are threatened if the Court reverses the decision below.

SUMMARY OF ARGUMENT

The Clean Water Act, one of the nation's most vital environmental laws, regulates the discharge of pollutants into waters of the United States. It does so in large part through two permit programs. First and most comprehensive, section 402 requires a National Pollutant Discharge Elimination System ("NPDES") permit for discharges of pollutants by industrial and municipal sources. 33 U.S.C. § 1342. Second, section 404 requires a permit for discharges of "dredged or fill material," which often involves physical alterations to water bodies, such as the filling of wetlands or other waters to facilitate construction. 33 U.S.C. § 1344. In essence, section 404 is

an exception to the ordinary rule of NPDES permitting for a very narrow subset of discharges to water – those that may physically alter the aquatic environment in an adverse way. Unless a discharge is permitted under one of these programs, it is prohibited. 33 U.S.C. § 1311(a).

The differences between the two Clean Water Act permit programs are significant, reflecting their very different purposes. The NPDES program works to protect the nation's waters from the disposal of polluted waste streams. It does so by incorporating industry-specific technology-based effluent limitations designed to reduce and eventually eliminate the discharge of pollution. Importantly, the U.S. Environmental Protection Agency ("EPA") develops effluent limitation guidelines to establish technology-based requirements for all categories and classes of pollutant discharges. States, which typically issue individual NPDES permits under federal law, must translate these guidelines into effluent limitations and must include any other protections necessary to ensure compliance with state water quality standards. The statute expressly requires periodic review and updating of available controls, effluent limitations, and individual permits to ensure that pollution loading continues to decrease as technology improves.

Section 404 dredge and fill material permits, on the other hand, ordinarily target the physical impairment of rivers, wetlands, and other waters and

the destruction of aquatic habitat, rather than end-of-the-pipe discharges. Implemented primarily by the U.S. Army Corps of Engineers ("Corps") with minimal EPA oversight and little state involvement, dredge and fill permits cover what are typically one-time construction activities. For this reason, the section 404 program does not focus on effluent limitations and control technologies, but instead addresses ecological impacts by requiring project proponents to first avoid, then minimize, and then mitigate any project impacts. Because section 404 is not intended to address ongoing pollution discharges, dredge and fill permits also do not include the kind of monitoring, reporting, review, and renewal provisions that lie at the heart of the technology-forcing NPDES program. Thus, while the section 404 permit program plays a vital role in protecting the nation's waters from the harmful effects of discharges that convert water bodies to dry land, it simply is not equipped – and was never intended – to displace the regulation of industrial pollutants under section 402.

The Corps' and Petitioners' position here contravenes this basic statutory architecture by authorizing what is self-evidently an ongoing discharge of industrial pollutants under the section 404 dredge and fill permit program. The proposed new Kensington Mine gold processing facility will discharge an estimated 210,000 gallons of polluted wastewater every day into a sub-alpine lake in the Tongass National Forest. This wastewater stream is the result of a froth-flotation process that uses a variety of conditioners

and frothing agents to separate gold from the rest of the mined material. Joint Appendix ("JA") 192a. Once the gold is extracted, the resulting waste stream is a slurry – a suspension of solids in water – consisting of chemical additives, heavy metals such as aluminum, copper, lead and mercury, and crushed rock debris. With a pH of 10, this waste slurry will kill all fish and most other aquatic life in Lower Slate Lake. *Id.* at 197a, 206a. The toxicity resulting from the discharge may well preclude the lake from ever again providing a suitable habitat for macroinvertebrates, which are critical for supplying nutrients to fish. *Id.* at 199a. Thus, "the extent to which aquatic life could be restored eventually is unclear." *Id.* at 522a. To avoid these kinds of harms, and after evaluating the availability of treatment alternatives, EPA in 1982 established a zero-discharge standard of performance for wastewater from new froth-flotation gold processing operations like Kensington Mine. 40 C.F.R. § 440.104(b)(1). If reversed, this case would allow the facility to circumvent EPA's long-standing no-discharge standard.

The implications of Petitioners' and the Corps' statutory interpretation in this case extend well beyond the gross pollution of the Lower Slate Lake and the complete destruction of its ecosystem. Many industries currently discharge polluted wastewater containing sediments or other settlable solids that might alter the bottom elevation of the receiving water. Indeed, EPA has established technology-based standards for total suspended solids from many

industrial categories. Under Petitioners' reading of the Clean Water Act, these sources could well fall out of the NPDES program altogether by virtue of the solids content in their waste streams, even when those wastes contain significant levels of harmful industrial pollutants. Such a result would violate the plain reading of the Clean Water Act, dramatically undercut the Act's fundamental structure, and mark a radical departure from more than 30 years of agency practice. Moreover, it could significantly alter the states' important historical role in regulating local water quality by controlling industrial discharges. The Court should not embrace an interpretation of the Clean Water Act that both subverts the plain language of the law and threatens to upend the successful federal-state partnership that has moved the nation's waterways ever closer to the statutory goals of "swimmable" and "fishable." *See* 33 U.S.C. § 1251(a)(2).

ARGUMENT

The decision below properly recognized that this dispute is resolved by the plain language of section 306(e), which has independent force and declares that all new sources "shall" comply with any applicable performance standard. 33 U.S.C. § 1316(e). As Respondents explain, because EPA has promulgated a zero-discharge standard of performance for the froth-flotation process at issue here, no discharge can be permitted under the Corps' discretionary section 404

permitting program, even if the resulting wastewater has sufficient solids to alter the bottom elevation of a water of the United States. Claims to the contrary in this lawsuit are an improper attempt to rewrite this standard of performance without following the proper rulemaking process. A judicial interpretation of the Clean Water Act that allows a section 404 permit to override duly promulgated standards of performance and effluent limitations undermines the fundamental structure and intent of the statute.

I. CONGRESS INTENDED SECTION 402, NOT SECTION 404, TO CONTROL THE DISCHARGE OF INDUSTRIAL POLLUTANTS IN PROCESS WASTEWATER.

A. Section 402 Establishes a Comprehensive, Technology-Based Program to Regulate Industrial Discharges and Reduce or Eliminate Pollutant Loading Over Time.

The plain language, statutory structure, historical background, and legislative history of the Clean Water Act all demonstrate that Congress intended to regulate industrial process wastewater of the kind at issue here through the comprehensive NPDES program, not through section 404 dredge and fill permits. Under the umbrella of section 402, Congress created an all-encompassing wastewater discharge permit program to protect public health and preserve water quality for industrial, domestic, recreational, and wildlife uses. The section 402

program is undergirded by the discharge prohibitions, effluent limitations, and water quality standards embodied in sections 301, 303, 304, and 306 of the statute. Together with the statute's information gathering, monitoring, and reporting requirements, these substantive provisions are designed to implement the "national goal that the discharge of pollutants into navigable waters be eliminated," 33 U.S.C. § 1251(a)(1).

The Clean Water Act, enacted in the wake of an alarming rise in industrial pollution, establishes an overarching objective "to restore and maintain the chemical, physical and biological integrity of the nation's waters," 33 U.S.C. § 1251(a). For the two decades immediately following World War II, congressional efforts to address the expanding water pollution problem from a receiving water quality perspective proved largely unsuccessful. *See Weyerhauser Co. v. Costle*, 590 F.2d 1011, 1042 (D.C. Cir. 1978). For this reason, the 1972 overhaul of the Clean Water Act charted a bold new course for protecting the quality of the nation's waters by requiring technology-based permits for any discharge of any pollutant into waters of the United States.

The new NPDES permitting program was designed "to set and enforce standards to abate and control water pollution" through two major changes, "[f]irst, the [amended statute] . . . aimed at achieving maximum 'effluent limitations' on 'point sources,' as well as achieving acceptable water quality standards[,]" and second, the discharger's performance

was "measured against strict technology-based effluent limitations. . . ." *EPA v. Cal. ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 204 (1976).[2] In particular, the statute charges EPA with the responsibility for determining "best available technology" for the control of toxic and other non-conventional pollutants and "best conventional pollutant control technology" for conventional pollutants such as organic wastes, and for converting these determinations into effluent limitation guidelines for particular industrial categories. 33 U.S.C. § 1311(b)(2)(A) & (E), 1314(b). Each state must also adopt local water quality standards to achieve the statute's overarching mandate, taking into consideration public health and designated uses, including the need for public water supplies, the propagation of fish and wildlife, and recreational, agricultural, industrial, navigational and other purposes. 33 U.S.C. § 1313(c). EPA regulations unequivocally mandate that "[i]n no case shall a State adopt waste transport or waste assimilation as a designated use for any waters of the United States." 40 C.F.R. § 131.10.

Permitting agencies translate the EPA technology-based guidelines into actual discharge limits in individual NPDES permits. If technology-based

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[2] For a more comprehensive discussion of the Clean Water Act's various provisions, see Ralph L. Stephenson & James W. Blackburn, *The Industrial Wastewater Systems Handbook* 12 (1998), *available at* http://books.google.com/books?id=4TX_WImt4zwC&printsec=frontcover#PPP1,M1.

effluent limitations are insufficient to meet state water quality standards, permitting agencies must incorporate more stringent water quality-based effluent limits into individual NPDES permits. Thus, the NPDES program is the heart of the modern Clean Water Act, and it serves as the primary tool through which effluent limitations, standards of performance, and water quality requirements are implemented. *See Chevron U.S.A., Inc. v. Hammond*, 726 F.2d 483, 489 (9th Cir. 1984). Forty-six states and one territory have been delegated authority by EPA to issue NPDES permits.[3]

Congress intended the NPDES program to be technology-forcing and expected that pollution levels would decrease as treatment technologies improved. Accordingly, the Clean Water Act mandates that EPA's assessment of available control technologies be revisited, and where appropriate strengthened, "at least annually." 33 U.S.C. § 1314(b). Similarly, EPA must review and revise technology-based effluent limitations every five years. 33 U.S.C. § 1311(d). And

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[3] *See* EPA, *State Program Status*, *available at* http://cfpub.epa.gov/npdes/statestats.cfm. The Clean Water Act not only allows states to administer the NPDES in lieu of the federal government, 33 U.S.C. § 1412(b); 40 C.F.R. Part 123, it also allows them to set more stringent standards to meet local water quality concerns. 40 C.F.R. § 131.4. Many states have taken advantage of this opportunity. *See, e.g.,* Pennsylvania Department of Environmental Protection, *Report on Water Quality Management Regulations with Provisions More Stringent Than Federal Requirements* (1995), *available at* http://www.dep.state.pa.us/dep/subject/rbi/federal.htm.

finally, individual NPDES permits for ongoing industrial discharges must be reviewed and renewed at least once every five years and are expressly subject to anti-backsliding provisions that prohibit the use of less stringent standards in subsequent permits. 33 U.S.C. § 1342(b)(1)(B) & (o)(1). Through this carefully crafted process, dischargers must satisfy increasingly stringent technology-based controls and effluent limitations, in an effort to achieve the Acts zero-discharge goal. *See Natural Res. Def. Council v. Train*, 510 F.2d 692, 707 (D.C. Cir. 1975); *see also* S. Rep. 92-414, 1972 U.S.C.C.A.N. 3668, 3701 (1971) ("[T]he program established by this section requires increasingly tougher controls on industry; . . . industry will be required every five years to re-evaluate its control efforts and to apply the best technology then available. . . .").

Another important aspect of the NPDES program is its incorporation of data collection and disclosure requirements. EPA must establish monitoring and reporting requirements to ensure that permittees consistently comply with effluent limitations, standards, and permit conditions. 33 U.S.C. § 1318(a). Dischargers must prepare and maintain records and reports, sample effluent, and allow entry by EPA or the state permitting agency, all for the purpose of ensuring compliance with the Clean Water Act. *Id.* Each NPDES permit must incorporate these requirements. 33 U.S.C. § 1342(a)(2); 40 C.F.R. §§ 122.41(j) (monitoring and recordkeeping) & 122.42(a) (additional

reporting requirements for manufacturing, commercial, mining, and silvicultural dischargers). The resulting information is generally available to the public, 33 U.S.C. § 1318(b), which can enforce NPDES permit standards, if necessary, through the statute's citizen suit provisions. *See* 33 U.S.C. § 1365(a)(1)(A) & (f)(6).

B. Section 404 Functions Differently from Section 402 by Employing a "Practicability" Standard and Applying a Hierarchy of Avoidance, Minimization, and Mitigation Rather than Strict Pollution Control Technologies.

By contrast, section 404 establishes a narrowly tailored permit program intended to apply not to industrial pollutant discharges, but rather to earth moving activities that may physically alter and thereby adversely affect the nation's waters. As it considered path-breaking water pollution control legislation in 1972, Congress was aware that dredge and fill activities presented a different threat than industrial discharges. *See, e.g.,* 117 Cong. Rec. 38,797, 38,853 (Nov. 2, 1997), *reprinted in* 1 Sen. Comm. On Public Works, 93d Cong., 1st Sess., A Legislative History of the Water Pollution Control Act Amendments of 1972 ("CWA Leg. Hist."), at 1386 (statement by senator who introduced section 404 provision noting that "[o]ne of the main deficiencies of this bill is that it treats dredged materials the same as industrial waste, sewage, sludge, or refuse introduced into a river system, lake estuary or ocean. The disposal of

dredged material does not involve the introduction of new pollutants; it merely moves the material from one location to another.").[4] Congress also was "uniquely aware" that the Corps historically had authority to regulate dredging, filling, and construction in navigable waterways of the United States under section 10 of the Rivers and Harbors of 1899, 33 U.S.C. § 403, and it "did not wish to create a burdensome bureaucracy in light of the fact that a system to issue permits already existed." Conf. Rep. No. 92-500, *reprinted in* CWA Leg. Hist. at 177. Thus, Congress carved out a limited exception to the NPDES permit program for such earth moving activities by creating the separate section 404 permit process. *See* Michael Hollins, *Addition by Removal? National Mining Limits Section 404 Control of Construction in Wetlands,* 14 J. Land Use & Envtl. L. 341, 345-48 (1999) (explaining that section 404 was intended as a narrow exception to section 402).

Section 404 functions quite differently from section 402. Significantly, it is administered primarily

[4] This statement is not necessarily correct as a factual matter because, as we have learned, dredged and fill material can contain harmful pollutants, but it demonstrates that Congress intended section 404 as a limited carve-out from the broader section 402 permitting scheme. Congress understood that sections 301 and 404 are intended to control movement of dredged material within a waterbody, as well as the introduction of fill material from outside a waterbody. In addition to destroying and altering the receiving water, both dredged and fill material can result in significant pollution in downstream waters by causing sediment, turbidity, and other impairments.

by the Corps, an agency whose historic expertise lies in engineering, navigation, and flood damage protection, not pollution control. Although EPA is the agency responsible for ultimately ensuring that Corps-issued permits comply with the Clean Water Act and has supervisory authority to review section 404 permits issued by the Corps, 33 U.S.C. § 1344(c), an interagency agreement makes clear that only those specific individual permit decisions that involve "aquatic resources of national importance" will be elevated for formal EPA review, and even that limited review involves a cumbersome multi-step administrative process. *Clean Water Act Section 404(q) Memorandum of Agreement Between the Environmental Protection Agency and the Department of the Army* (Aug. 11, 1992) at Part IV(1).[5] Moreover, while roughly 1,640,000 section 404 applications were submitted between 1979 and 2005, EPA utilized its section 404(c) veto authority only 11 times, with virtually all of these vetoes occurring in the 1980's. EPA, *Clean Water Act Section 404(c) "Veto Authority."*[6] Earlier this year, EPA finally issued one additional veto for a project that would have drained and damaged at least 67,000 acres of wetlands in northwest Mississippi, bringing the total to 12 permit vetos in 36 years.[7]

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[5] *Available at* http://www.usace.army.mil/cw/cecwo/reg/mou/epa404q.htm#3.

[6] *Available at* http://www.epa.gov/owow/wetlands/pdf/404c.pdf.

[7] *See* EPA, *Chronology of 404(c) Actions*, http://www.epa.gov/owow/wetlands/regs/404c.html.

Similarly, while the Clean Water Act allows partial delegation of the section 404 program to the states, only two states have assumed such responsibility. 33 U.S.C. § 1344(g) (allowing delegation for waters other than, *inter alia*, "those waters which are presently used, or are susceptible for use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce"); 40 C.F.R. §§ 230.70-.71 (partially delegating section 404 permit authority to Michigan and New Jersey). Thus, the section 404 program is implemented largely by an agency within the Department of Defense, rather than by state or local water quality officials. The Corps has been widely criticized for its poor implementation of the section 404 program, and for inadequate enforcement of section 404 permits.[8]

Moreover, because earth moving and land conversion activities do not readily lend themselves to end-of-pipe technology controls and because section 404 is not intended to regulate industrial pollutants, the dredge and fill program does not use "best available" control

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[8] *See, e.g.*, GAO, *Wetlands Protection: Corps of Engineers Does Not Have an Effective Oversight Approach to Ensure that Compensatory Mitigation is Occurring* 2 (2005) (concluding that "parts of the guidance [for compensatory mitigation] are vague or internally inconsistent" and that the Corps districts visited by the GAO "performed limited oversight to determine the status of compensatory mitigation."); GAO, *Report to Congressional Requesters*, *The Scope of Section 404 Program Remains Uncertain* (1993) (noting significant continuing problems with Corps enforcement of the program); GAO, *The Corps of Engineers' Administration of the Section 404 Program* (1988) (same).

strategies, effluent limitations, and standards of performance. Instead, section 404 discharge requirements are uniquely designed to protect water quality and aquatic habitat from the impacts of dredge and fill activities. Section 404(b)(1) permit guidelines allow the Corps to issue permits only where there is no "practicable alternative" that would cause less damage to the aquatic ecosystem. These guidelines also prohibit, *inter alia*, discharges of dredged or fill material where the discharge would have unacceptable impacts on water quality, violate toxic standards or prohibitions under the Act, have unacceptable impacts on endangered species, or violate requirements that protect marine sanctuaries. 40 C.F.R. § 230.10.[9]

Once the Corps decides that a permit can be issued, the agency must ensure that "appropriate and practicable steps have been taken which will minimize potential adverse impacts of the discharge on the aquatic ecosystem." 40 C.F.R. § 230.10(d). As interpreted by the Corps and EPA, the guidelines require (1) avoidance of impacts to the maximum extent practicable, (2) minimization of unavoidable impacts where "appropriate and practicable," and finally (3) compensatory mitigation for unavoidable impacts, in that order. *Memorandum of Agreement Between The Department of Army and The Environmental Protection Agency Concerning the Determination of*

[9] *Available at* http://www.usace.army.mil/cw/cecwo/reg/2003webcharts.pdf (FY 2003); http://www.usace.army.mil/cw/cecwo/reg/2002webcharts.pdf (FY 2001 and FY 2002).

Mitigation Under the Clean Water Act Section 404(b)(1) Guidelines (Feb. 6, 1990).[10] The guidelines make no mention of the new standard performance requirements of section 306 for the simple reason that section 404 is not intended to regulate the type of sources – such as wastewater from froth-flotation processes – subject to those requirements.

Despite these guidelines, actual implementation of the section 404 program has proven less than adequately protective of our Nation's waters. Corps practice indicates that it pays little adherence to avoidance of impacts. Although the agencies have a "goal" of "no net loss of wetlands functions and values,"[11] they have admitted that application of the "appropriate and practicable" standard in any particular instance "may lead to individual permit decisions which do not fully meet this goal because the mitigation measures necessary to meet this goal are not feasible, not practicable, or would accomplish only inconsequential reductions in impacts." *Id.* In 2001, the National Research Council concluded that "[t]he goal of no net loss of wetlands is not being met for wetland functions by the [section 404] mitigation program, despite progress in the last 20 years." National Research Council, *Compensating for Wetland Losses Under the Clean Water Act* 2 (2001). Scientists have found that "the section 404 permitting

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[10] *Available at* http://www.usace.army.mil/cw/cecwo/reg/mou/mitigate.htm.

[11] There is no similar "no net loss" goal for impacts permitted to other waters of the United States under the 404 program.

program has been fostering an 80 percent net loss of wetlands." R. Eugene Turner, et al., *Count It by Acre or Function – Mitigation Adds Up to Net Loss of Wetlands,* National Wetlands Newsletter, November-December 2001. There is no indication that the Corps' implementation of the section 404 program is achieving any better results for other waters, such as lakes and streams.

In short, section 404, which the Corps itself acknowledges "was intended by Congress to provide a vehicle for regulating materials whose effects include the physical conversion of waters to non-waters," 65 Fed Reg. 21,292, 21,293 (Apr. 20, 2000), does not provide the regulatory structure to effectively safeguard the nation's waters from discharges of industrial pollutants or move us toward the statutory goal of eliminating such discharges.

C. The Corps' Approach in This Case Marks a Radical Departure From Congressional Intent and Past Agency Practice.

1. Congress, the Corps, and the Courts Have All Recognized the Distinction Between Mining Process Wastes and Fill.

While section 404 plays an important role in regulating the discharge of dredge and fill material, it was never meant to regulate contaminated wastewater from mining or other industrial processes. One of Congress' principal goals in enacting the Clean

Water Act was to eliminate the ongoing practice of using lakes and rivers for waste disposal. *See* S. Rep. No. 92-414, at 7 (1971), *reprinted in* 1971 U.S.C.C.A.N. 3668, 3674 ("The use of any river, lake, stream or ocean as a waste treatment system is unacceptable."). As Respondents explain in their brief, Congress recognized that the disposal of mining wastes was part of the problem, and it intended that the industrial pollution controls articulated for the first time in the 1972 amendments to the Clean Water Act would apply to such disposal activities, including specifically the disposal of slurried mine tailings similar to the waste stream that will be produced at Kensington Mine. *See* Brief of Respondents' at 40-44 (discussing congressional intent to preserve EPA's enforcement claims in *Reserve Mining Co. v. EPA*, 514 F.2d 492 (8th Cir. 1975) when section 402 permits replaced discharge permits under section 13 of the Refuse Act, 33 U.S.C. § 407).

The process mining wastes discharged into Lake Superior in *Reserve Mining* and the froth-flotation process wastes to be disposed into Lower Slate Lake in this case are similar to each other and categorically distinct from the mine "overburden" at issue in such mountain-top removal cases as *Kentuckians for the Commonwealth v. Rivenburgh*, 317 F.3d 425 (4th Cir. 2003). That case involved burying valley waterways with rock and soil left over from the strip

mining process.[12] Because the material was *not* the result of a chemical process regulated by an applicable effluent guideline, *Kentuckians* did *not* raise the issue of whether section 404 was appropriate for the discharge of toxic mine waste slurries that are subject to national standards of performance.

In *Kentuckians,* the Corps argued that section 404 regulations were "designed to address changes that convert waters of the U.S. to dry land" whereas the focus of section 402 is on "wastewater from industrial operations." *Id.* at 446 ("Fill material differs fundamentally from the types of pollutants covered by section 402 because the principal environmental concern is the loss of a portion of the water body itself.") (quoting 65 Fed. Reg. at 21,293). The Fourth Circuit upheld as permissible the Corps' definition of "fill material" to mean "all material that displaces water or changes the bottom elevation of a water body *except for 'waste' – meaning garbage, sewage, and effluent that could be regulated by ongoing effluent limitations as described in § 402.*" *Id.* at 448 (emphasis added). Thus, *Kentuckians* (and the Corps) recognized that industrial waste subject to section 402 effluent limitations is not "fill" within the meaning of section 404.

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[12] *Amici* agree with the district court in *Kentuckians* and strongly oppose the issuance of section 404 permits for the disposal of mine overburden in U.S. waters as such disposal activities cannot meet the standards applicable to the issuance of such permits.

While the proposed Kensington Mine discharge will raise the bottom elevation of Lower Slate Lake by over 50 feet, JA 519a, thereby smothering benthic habitat and decimating ecological function, it *also* will have the effect of dramatically degrading water quality through the introduction of harmful industrial pollutants, pollutants whose discharge is limited by an applicable standard of performance. *Id.* 192a. In fact, nearly all aquatic life in the lake will be destroyed by the effects of the discharge, and it is not clear that a functional ecosystem can ever be restored. *Id.* 522a. The Kensington Mine discharge will use a natural lake as a disposal site for contaminated *industrial process wastes*. Petitioners' approach thus threatens to return the nation to the days when polluters deliberately used our public lakes and rivers as private dumping grounds – a practice that served as one of the key drivers for the 1972 revamping of the Clean Water Act.

2. EPA Has Long Recognized that Discharges from the Industrial Processing of Mining Wastes Are Subject to Section 306 and Section 402 of the Clean Water Act.

Until now, the federal agencies have not disputed that mining process waste slurries constitute industrial discharges subject to effluent limitations and the NPDES permit program, even if they also contain solids that may physically alter waters of the United States. In 1982, EPA exercised its authority under

section 306 of the Clean Water Act to establish a "no discharge" standard of performance for process wastewater into waters of the United States from new mills that use froth-flotation for beneficiation of gold ore – precisely the process at issue here. 40 C.F.R. § 440.104(b)(1). Congress directed EPA to impose the most stringent technology-based effluent limitations, called standards of performance, under section 306 because "[n]ew facilities have the opportunity to implement the best and most efficient. . . . wastewater technologies," including technologies applicable to ore mining and mill processes. 47 Fed. Reg. 25,682, 25,696 (June 14, 1982). Section 306 standards of performance must reflect "the greatest degree of effluent reduction which the Administrator determines to be achievable through application of the best available demonstrated control technology, processes, operating methods, or other alternatives, including, where practicable, a standard permitting no discharge of pollutants." 33 U.S.C. § 1316(a)(1). Once a standard of performance is adopted, all new sources must comply; there are no variances available. *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 138 (1985).

EPA has expressly recognized that the froth-flotation standard, like other section 306 standards of performance and section 301 effluent limitations, is implemented for individual mining and mill operations through NPDES permits issued by state permitting authorities or EPA under section 402. 47 Fed. Reg. 54,598, 54,606 (Dec. 3, 1982). The subsequent

effort by EPA and the Corps to clarify the definition of "fill material" did not alter this fact or negate the applicability of sections 306 and 402 to mine process wastewater. In the preamble to the final rule, the agencies stated unequivocally that, "[n]or does today's rule change any determination we have made regarding discharges that are subject to an effluent limitation guideline and standards, which will continue to be regulated under section 402 of the CWA." 67 Fed. Reg. 31,129, 31,135 (May 9, 2002). Since EPA determined that a zero-discharge standard was achievable for new froth-flotation gold processing facilities more than two and a half decades ago, the Corps has never attempted to issue a section 404 permit for such an operation – until the Kensington Mine project.[13]

In sum, the issuance of a section 404 permit for the discharge of industrial mining process wastes into waters of the United States is a startling departure from the Corps' and EPA's prior interpretations and past actions. It also flies directly in the face of section 306, which (when combined with the existing standard of performance for this industry) unambiguously prohibits the discharge of wastewater from new gold ore froth-flotation processing facilities into waters of

[13] The Corps occasionally grants section 404 permits to mining operators for construction of man-made tailings ponds when that construction impacts waters and wetlands under the Corps' jurisdiction. However, section 404 permits do not authorize the introduction of mining waste slurries into waters of the United States; a separate section 402 permit is required for that discharge activity.

the United States. Accordingly, the court of appeals' decision should be affirmed.

II. PETITIONERS' NEW INTERPRETATION OF SECTION 404 VIOLATES THE CLEAR LANGUAGE OF THE CLEAN WATER ACT AND UNDERMINES THE ACT'S BASIC REGULATORY FRAMEWORK.

Beyond allowing the pollution of Lower Slate Lake, the Corps' approach in this case threatens to fundamentally alter and weaken the long-standing Clean Water Act regulatory structure by blurring the distinction between the section 402 and section 404 programs across many industrial categories, not just the mining industry. Moreover, a reversal of the decision below will undermine the principles of cooperative federalism embedded in the Clean Water Act by shifting responsibility for implementation and enforcement of discharge standards that affect water quality away from state and local agencies.

A. Applying Section 404 to Industrial Waste Discharges Directly Conflicts With Sections 306 and 402 and Would Allow Many Mining and Other Industrial Wastes to Avoid Effluent Limitations.

Petitioners' and the Corps' interpretation of the Clean Water Act threatens to fundamentally alter the regulation of this country's industrial process

discharges, including but not limited to mining wastes. Their expansive view of section 404 could allow toxic and other industrial pollutants from whole categories of regulated industries to escape section 306 standards of performance and NPDES effluent limitations merely because a facility's waste stream also contains sediment or settleable solids. Some industrial facilities may even have an incentive to add sand or other solids to their waste in order to invoke the section 404 process and thereby to evade the more stringent and more appropriate standards applicable under section 402. *See* 33 U.S.C. § 1342 (exempting discharges authorized under section 404 from the section 402 permit requirements). At the very least, a reversal of the lower court's clear decision would blur the regulatory line and open the door for industry to argue in every close case that the Corps should have authority to permit industrial wastewater discharges, rather than complying with applicable standards enforced via the section 402 permitting program.

Most obviously at risk are waters currently protected by existing standards for the mining of ore and the subsequent processing of such metals as titanium, platinum, iron, and mercury, including the froth-flotation gold mining process at issue here. *See* 40 C.F.R. Part 440. Standards for coal mining, which apply to coal preparation plants and associated areas, acid or ferruginous mine drainage, postmining areas, coal remining, and western alkaline coal mining, would also be implicated. *See* 40 C.F.R. Part 434.

Other effluent limits and standards of performance apply to approximately 20 subcategories of mineral mining related activities, including the mining of crushed stone, sand and gravel, borax, phosphate rock, sodium sulfate, and several other minerals. *See* 40 C.F.R. Part 436. If Petitioners' interpretation prevails in this case, there is little to stop facilities engaged in each of these mining categories from seeking a section 404 dredge and fill permit for their industrial process waste streams in lieu of meeting more protective section 306 and section 402 requirements.

But well beyond mining operations, most industrial discharges contain solids that are regulated under the section 402 program. Many of the other 50-plus categories of point sources for which the EPA has promulgated standards and guidelines over the years discharge effluent with high solids content. For example, the EPA has promulgated standards for 12 subcategories of dairy products processing, 40 C.F.R. Part 405; 10 subcategories of grain mills, 40 C.F.R. Part 406; three subcategories of cement manufacturing, 40 C.F.R. Part 411; 9 subcategories of leather tanning and finishing, 40 C.F.R. Part 425; 16 subcategories of timber products processing, 40 C.F.R. Part 429; and 12 subcategories of meat and poultry products processing, 40 C.F.R. Part 432. These and other categories of discharges typically contain high volumes of solids. *See, e.g.*, 51 Fed. Reg. 24,974, 24,988 (July 9, 1986) (explaining treatment technology to address excess solids in dairy products processing); 67

Fed. Reg. 8,582, 8,590, 8,595-97 (Feb. 25, 2002) (noting that untreated wastewater from meat and poultry facilities contains high concentrations of solids and that primary treatment technology focuses on the removal of floating and settleable solids).

Altogether, more than 65,000 industrial and municipal sources are regulated under NPDES permits and subject to technology-based effluent limitations or standards of performance. *See* EPA, *Technical Support Document for the 2004 Effluent Guidelines Program Plan* (2004) at 4-6.[14] To the extent that these discharges arguably may alter the bottom elevation of a receiving water, countless facilities could seek the shelter of section 404 dredge and fill permits in lieu of their present section 402 permits. Even if such efforts were ultimately unsuccessful in some cases, the regulatory signal sent by Petitioners' and the Corps' new interpretation of the "fill material" rule is likely to generate significant future uncertainty and litigation by blurring the long-standing demarcation between the Clean Water Act's two distinct permitting programs.

The incentive created by this new interpretation undermines decades of EPA effort to reduce industrial discharges of solids and sediments, which are problems in their own right. Sediments like sand, silt, and clay are among the greatest threats to water quality

[14] *Available at* http://www.epa.gov/guide/304m/tsd.pdf.

in the United States.[15] *See* Bernard J. Nebel & Richard T. Wright, *Environmental Science: The Way the World Works* 281 (1993). In addition to blocking out light, and thus limiting photosynthesis, sediments that settle along the bottom of a water body smother organisms and bury habitat. *Id.* Sediments critically affect fisheries and drinking water, causing over $16 billion in environmental damage annually. *See* Mid-America Regional Council, *What is Sediment Pollution?*[16]

A major category of pollutant regulated under the NPDES program is total suspended solids ("TSS"). 40 C.F.R. § 401.16; defined in 40 C.F.R. Part 136. Suspended solids are considered pollutants because of their adverse effects on water quality, particularly the impacts of turbidity on fish. *See* Neville Ward, *The Problem of Sediment in Water for Fish* 2 (1992).[17] Under sections 301 and 306, EPA has promulgated dozens of effluent limitation guidelines and standards of performance covering TSS for a wide range of

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[15] EPA defines sediment as "[p]articulate organic and inorganic matter that accumulates in a loose, unconsolidated form on the bottom of natural waters." EPA, *EPA Terminology Services, available at* http://iaspub.epa.gov/sor_internet/registry/termreg/searchandretrieve/termsandacronyms/search.do.

[16] *Available at* http://www.epa.gov/nps/toolbox/other/KSMO_Sediment.pdf.

[17] *Available at* http://www.mnr.gov.on.ca/MNR_E005389.pdf.

industrial sources and discharges,[18] including mining slag and tailings.[19] *See, e.g.*, 40 C.F.R. § 421.244

[18] Examples of EPA effluent limitations that restrict total suspended solids include: Grain Mills, 40 C.F.R. § 406.16; Aluminum Smelting, 40 C.F.R. § 421.22; Copper Refining, 40 C.F.R. §§ 421.52, 421.54; Lead Manufacturing, 40 C.F.R. §§ 421.72, 421.132, 421.134; Zinc Manufacturing, 40 C.F.R. § 421.84; Metallurgic Acid Plants, 40 C.F.R. §§ 421.92, 421.94; Tungsten Manufacturing, 40 C.F.R. §§ 421.102, 421.104; Columbium-Tantalum Manufacturing, 40 C.F.R. §§ 421.112, 421.114; Silver Manufacturing, 40 C.F.R. §§ 421.122, 421.124; Antimony Manufacturing, 40 C.F.R. §§ 421.142, 421.144; Beryllium Manufacturing, 40 C.F.R. §§ 421.152, 421.154; Germanium and Gallium Manufacturing, 40 C.F.R. §§ 421.182, 421.184; Indium Manufacturing, 40 C.F.R. § 421.194; Mercury Manufacturing, 40 C.F.R. § 421.204; Molybdenum and Rhenium Manufacturing, 40 C.F.R. §§ 421.212, 421.214; Molybdenum and Vanadium Manufacturing, 40 C.F.R. §§ 421.222, 421.224; Nickel and Cobalt Manufacturing, 40 C.F.R. §§ 421.232, 421.234; Nickel Manufacturing, 40 C.F.R. § 421.244 (slag tailings); Precious Metals and Mercury Manufacturing, 40 C.F.R. §§ 421.252, 421.254; Precious Metals Manufacturing, 40 C.F.R. §§ 421.262, 421.264; Rare Earth Metals, 40 C.F.R. § 421.274, Tantalum Manufacturing, 40 C.F.R. §§ 421.282, 421.284; Tin Manufacturing, 40 C.F.R. §§ 421.292, 421.294; Titanium Manufacturing, 40 C.F.R. §§ 421.302, 421.304; Tungsten and Cobalt Manufacturing, 40 C.F.R. §§ 421.312, 421.314; Uranium Manufacturing, 40 C.F.R. §§ 421.322, 421.324; Zirconium and Hafnium Manufacturing, 40 C.F.R. §§ 421.332, 421.334; Timber Products Processing, 40 C.F.R. § 429.111; Coal Mining, 40 C.F.R. Part 434, App. B; and Ferroalloy Slag Processing, 40 C.F.R. § 424.32.

[19] The Compact Oxford Dictionary defines "slag" as "stony waste matter separated from metals during the smelting or refining of ore." *The Compact Oxford Dictionary* (3d ed.), *available at* http://www.askoxford.com/concise_oed/slag. "Tailings" is defined by EPA Terminology Services as "[r]ock and other waste materials removed as impurities when minerals are mined and mineral deposits are processed." EPA, *EPA Terminology Services*,

(Continued on following page)

(nickel slag tailings); 40 C.F.R. § 421.222, § 421.224 (molybdenum and vanadium tailings). TSS limitations generally require the reduction of solids before a waste stream is discharged into waters of the United States, and they often require the *complete* removal of all suspended solids from new point sources[20] – precisely the opposite result achieved by the Corps' new expansive interpretation of section 404. Dischargers currently subject to TSS limitations would have every incentive to circumvent those limitations through a request for a section 404 permit in place of their NPDES permit.

B. Applying the Section 404 Permitting Scheme to Industrial Waste Discharges Undermines the Role of the States in the Section 402 Permitting Program and Reallocates Power to the Federal Government, Contrary to Congress' Explicit Intent.

As the Court has noted, the Clean Water Act expressly establishes that it is the "'policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of the States to prevent, reduce, and eliminate pollution. . . .'" *Rapanos v.*

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available at http://iaspub.epa.gov/sor_internet/registry/termreg/searchandretrieve/termsandacronyms/search.do.

[20] *See, e.g.*, Aluminum Smelting, 40 C.F.R. §§ 421.24, 421.34 (setting discharge level for TSS at zero); Lead Manufacturing, 40 C.F.R. § 421.74 (same).

United States, 547 U.S. 715, 737 (2006) (plurality opinion) (quoting 33 U.S.C. § 1251(b)). In the decades since Congress penned those aspirational words, the section 402 permit program has blossomed into a successful example of cooperative federalism, with EPA setting minimum national discharge standards and 46 states using their delegated NPDES permit authority to implement and, where appropriate, augment those standards to protect local water quality for a variety of desired human and ecological uses. The section 404 permit program has taken the opposite path; as explained above, the Corps makes most permitting decisions with little involvement from EPA, state and local officials, or the public.

If widely adopted, the Corps' approach at the Kensington Mine facility threatens to shift significant responsibility for water quality protection from the state and local level to the federal government. At the very least, mining facilities will have an incentive to move away from the section 402 program and into the shelter of section 404 permits; if other industrial facilities follow suit, states will be forced to relinquish their primary authority for setting and enforcing effluent limits and managing local water quality through the NPDES permit system.

III. KENSINGTON MINE HAS VIABLE ALTERNATIVES TO DISPOSING INDUSTRIAL WASTE IN NATURAL LAKES.

Petitioners and their supporting *amici* present the Court with a false dilemma – either allow disposal of the froth-flotation process waste into Lower Slate Lake and destroy the ecosystem or force Kensington Mine to comply with the law and destroy the business. In fact, conventional methods for disposing of mining waste that do not violate the Clean Water Act exist and are used in many other places. These include "dry stacking," paste disposal, and artificial ponds that operate as waste treatment facilities for the harmful pollutants contained in process wastewater. Some of these alternatives were considered by, and even supported by, the Kensington Mine project proponent.

A. Dry Stacking

The original plan for the Kensington Gold Mine, submitted to the EPA in 1997, proposed the construction of a "dry tailings facility" – also known as "dry stacking" – which would have dewatered the process wastewater and placed the solid tailings in a dry facility on land. JA 165a. Eventually, the dry tailings would be covered and restored to support natural vegetation. The EPA determined in 1997 that this disposal plan was environmentally preferable to lake disposal. *Id.* 211a-212a. Petitioner Ceour Alaska had received a permit from the Corps and EPA for the dry tailings facility, and its plan of operations was

approved by the U.S. Forest Service in 1997. *Id.* 165a. After a decline in gold prices, however, the company terminated its dry tailings plan and sought a cheaper way to dispose of its wastewater. *See Southeast Alaska Conservation Council v. U.S. Army Corps of Eng'rs*, 486 F.3d 638, 641 (9th Cir. 2007).

B. Paste Disposal

After losing the appeal below, Coeur Alaska entered into negotiations with Respondents, mediated by the mayor of Juneau, to explore alternative disposal methods that would not violate the Clean Water Act. The parties agreed to a solution that would deposit the tailings as "paste" near Alaska's Lynn Canal without discharging any process wastewater into waters of the United States. Similar to dry stacking, paste disposal methods involve surface disposal of mine wastes, but allow for pumping of mud-like tailings. This alternative disposal approach was submitted to EPA for the Kensington Mine in January 2007. When this Court granted Petitioners' petition for certiorari, however, Coeur Alaska dropped its pursuit of the alternate permit.[21]

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[21] *See* Press Release, Coeur d'Alene Mines (Sept. 23, 2008), *available at* http://phx.corporate-ir.net/phoenix.zhtml?c=86472&p=irol-newsArticle&ID=1200286; *see also Mine Gives Up Permits Pursuit*, SpokesmanReview.com, Sept. 26, 2008, http://www.spokesmanreview.com/business/story.asp?ID=262171.

C. Man-Made Holding Facilities for Mine Tailings

Man-made holding facilities, often referred to as man-made or artificial ponds, have been a conventional storage method for slurried mining waste for the last 30 years and are used widely in Alaska. This alternative, however, was never considered or proposed in Coeur Alaska's application for a permit from the Corps and EPA. These holding facilities for mine tailings are constructed specifically as waste treatment facilities for mining discharges where the refuse material is ponded to allow the settlement of solid particles from the water it is carried in. *See* Hossein et al., *A Brief Survey of Current Surface Waste Disposal Practices in the Metal Mining Industry*, 7 Int'l J. Mining, Reclamation, & Env't 23 (1993). The ponded water stores the toxic chemicals used in froth-flotation processes and contained in the resulting slurry. Mine operators using man-made holding facilities must obtain a section 404 permit if the construction will require dams, diversions, or will otherwise affect waters of the United States. However, a section 402 permit is required if the holding facility will discharge the treated material into a natural water body to ensure that any such discharge complies with the Clean Water Act's effluent limitations and standards of performance.

The practice of using man-made holding facilities for mining waste is similar to practices used to contain contaminated dredged material. While non-industrial dredge and fill activities require a section

404 permit, if the sediments contain other pollutants, such as heavy metals, EPA requires a section 402 permit implementing technology-based standards for any discharge into a natural body of water. *See* K.R. Demars et al., *Dredging, Remediation, and Containment of Contaminated Sediments* 195-96 (1995). Coeur Alaska's proposal is thus unlike the standard methods for disposing of mine processing wastes or the standard methods for treating contaminated dredged material.[22] It runs counter to the Clean Water Act and threatens to turn back the clock on more than three decades of water quality improvement.

[22] The key point is that natural waters of the United States cannot properly be used as a treatment facility for industrial waste, as proposed by Coeur Alaska. Instead, Coeur Alaska could create an artificial holding facility in an upland area not connected to or created from natural waters of the United States.

CONCLUSION

For the foregoing reasons, and the reasons set forth in Respondents' and other supporting *amicus* briefs, the decision below should be affirmed.

Dated: November 14, 2008

Respectfully submitted,

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